

IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 315 of 2015

[CRIMINAL JURISDICTION]

STATE

V

1. RATU MELI VATUREBA
2. NASONI RABURAU

Counsel : Ms. J. Fatiaki for State
Ms. B. Malimali for 1st accused
Ms. N. Mishra for 2nd accused

Hearing on : 24- 27 July 2017

Summing up on : 27 July 2017

SUMMING UP

Madam and gentleman assessors;

1. It is now my duty to sum up the case to you. I will now direct you on the law that applies in this case. You must accept my directions on law and apply those directions when you evaluate the evidence in this case in order to determine whether the accused are guilty or not guilty. You should ignore any opinion of mine on the facts of this case unless it coincides with your own reasoning. You are the judges of facts.
2. Evidence in this case is what the witnesses said from the witness box inside this court room, the exhibits tendered and the admitted facts. Your opinion should be based only on the evidence presented inside this court room. If you have heard,

heard, read or otherwise come to know anything about this case outside this court room, you must disregard that information.

3. A few things you heard inside this court room are not evidence. This summing up is not evidence. The arguments, questions and comments by the lawyers for the prosecution and the defence are not evidence. A suggestion made by a lawyer during the cross examination of a witness is not evidence unless the witness accepted that suggestion. The arguments and comments made by lawyers in their addresses are not evidence. You may take into account those arguments and comments when you evaluate the evidence only to the extent you would consider appropriate.
4. A statement made by a witness to the police can only be used during cross-examination to highlight inconsistencies. That is, to show that the relevant witness on a previous occasion had said something different to what he/she said in court. You have to bear in mind that a statement made by a witness out of court is not evidence. However, if a witness admits that a certain portion in the statement made to the police is true, then that portion of the statement becomes part of his/her the evidence.
5. You must not let any external factor influence your judgment. You must not speculate about what evidence there might have been. You must approach the evidence with detachment and objectivity and should not be guided by emotion. You should put aside all feelings of sympathy for or prejudice against, the accused or anyone else. No such emotion should influence your decision.
6. You and you alone must decide what evidence you accept and what evidence you do not accept. You have seen the witnesses give evidence before this court, their behavior when they testified and how they responded during cross-examination. Applying your day to day life experience and your common sense as representatives of the society, consider the evidence of each witness and decide how much of it you believe. You may believe all, part or none of any witness' evidence.

7. Experience shows that victims of sexual offences may react in different ways to what they went through. Some, in distress or anger may complain to the first person they see. Some, due to shame, fear, shock or confusion may not complain for some time or may not complain at all. A victim's reluctance to complain could also be due to shame coupled with the cultural taboos existing in the society in talking about matters of sexual nature. What happened in this particular case is, however, a decision for you to make. Your task is to decide whether you are sure that the complainant has given you a truthful and a reliable account of her experience concerning the offences the accused are charged with.
8. When you assess the testimony of a witness, you should bear in mind that a witness may find this court environment stressful and distracting. Witnesses have the same weaknesses you and I may have with regard to remembering facts. Sometimes we honestly forget things or make mistakes regarding what we remember.
9. In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his/her evidence. That is, whether the witness has not maintained the same position and has given different versions with regard to the same issue. This is how you should deal with inconsistencies. You should first decide whether that inconsistency is significant. That is, whether that inconsistency is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation for it. You may perhaps think it obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you might not expect every detail to be the same from one account to the next. If there is an acceptable explanation for the inconsistency, you may conclude that the underlying reliability of the account is unaffected.
10. However, if there is no acceptable explanation for the inconsistency which you consider significant, it may lead you to question the reliability of the evidence given by the witness in question. To what extent such inconsistencies in the

evidence given by a witness influence your judgment on the reliability of the account given by him/her is for you to decide.

11. Therefore, if there is an inconsistency that is significant, it might lead you to conclude that the witness is generally not to be relied upon; or, that only a part of his/her evidence is inaccurate; or you may accept the reason he/she provided for the inconsistency and consider him/her to be reliable as a witness.
12. You may also consider the ability and the opportunity a witness had, to see, hear or perceive in any other way what he/she said in evidence. You may ask yourself whether the evidence of a witness seem reliable when compared with other evidence you accept. These are only examples. It is up to you how you assess the evidence and what weight you give to a witness' testimony.
13. Based on the evidence you decide to accept, you may decide that certain facts are proved. You may also draw inferences based on those facts you consider as directly proved. You should decide what happened in this case, taking into account those proved facts and reasonable inferences. However, when you draw an inference you should bear in mind that that inference is the only reasonable inference to draw from the proved facts. If there is a reasonable inference to draw against an accused as well as one in his favour based on the same set of proved facts, then you should not draw the adverse inference.
14. In this case, there are certain facts which are agreed by the prosecution and the defence. You have been given copies of those admitted facts. You should consider those facts as proven beyond reasonable doubt.
15. As a matter of law you should remember that the burden of proof always lies on the prosecution. An accused is presumed to be innocent until proven guilty. This means that it is the prosecution who should prove that an accused is guilty and the accused is not required to prove that he is innocent. The prosecution should prove the guilt of an accused beyond reasonable doubt in order for you to find him guilty. You must be sure of the accused person's guilt.

16. In order to prove that an accused is guilty of a particular offence, the prosecution should prove all the elements of that offence beyond reasonable doubt. If you have a reasonable doubt in respect of any element of the offence an accused is charged with, as to whether the prosecution has proved that element, then you must find that accused not guilty of that offence. A reasonable doubt is not a mere imaginary doubt but a doubt based on reason. I will explain you the elements of the offences in a short while.
17. You are not required to decide every point the lawyers in this case have raised. You should only deal with the offences the accused are charged with and matters that will enable you to decide whether or not those charges have been proved.
18. You will not be asked to give reasons for your opinion. In forming your opinion, it is always desirable that you reach a unanimous opinion. But it is not necessary.
19. Let us now look at the Information. The Director of Public Prosecutions has charged the accused for the following offences;

FIRST COUNT

Statement of Offence

RAPE: contrary to section 207(1) and (2)(a) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

RATU MELI VATUREBA on the 18th day of September 2015 at the Korovou Prison Compound, in the Central Division, had carnal knowledge of Taraivini Sydney, without her consent.

SECOND COUNT

Statement of Offence

RAPE: contrary to section 207(1) and (2)(a) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

NASONI RABURAU on the 18th day of September 2015 at the Korovou Prison Compound, in the Central Division, had carnal knowledge of Taraivini Sydney, without her consent.

20. Though two accused persons are charged in the same Information, you should remember to consider the evidence against each accused separately. In the event you find one accused guilty, you must not simply assume that the other accused must be guilty as well. It is necessary that you consider whether the prosecution has proved each count against the respective accused beyond reasonable doubt separately.
21. To prove the offence of rape, the prosecution must prove the following elements beyond reasonable doubt;
 - a) the accused;
 - b) penetrated the vagina of the complainant with his penis;
 - c) without the consent of the complainant; and
 - d) the accused knew or believed that the complainant was not consenting; or the accused was reckless as to whether or not she was consenting.
22. The first element is concerned with the identity of the accused. This element is not in dispute in respect of both counts.
23. The second element involves the penetration of the complainant's vagina with the penis. The law states that this element is complete on penetration to any extent. Therefore, it is not necessary to have evidence of full penetration or ejaculation. A slightest penetration is sufficient to satisfy this element.
24. The third and the fourth elements are based on the issue of consent. To prove the third element of the offence of rape, the prosecution should prove that the accused penetrated the complainant's vagina without her consent.
25. You should bear in mind that consent means, consent freely and voluntarily given by a person with the necessary mental capacity to give consent and the fact that there was no physical resistance alone shall not constitute consent. A person's consent to an act is not freely and voluntarily given if it is obtained under the following circumstances;
 - a) by force; or

- b) by threat or intimidation; or
 - c) by fear of bodily harm; or
 - d) by exercise of authority.
26. Apart from proving that the complainant did not consent for the accused to insert his penis inside her vagina, the prosecution should also prove that, either the accused knew or believed that the complainant was not consenting; or the accused was reckless as to whether or not the complainant was consenting. This is the fourth element of the offence of rape.
27. If the accused was aware of the risk that the complainant may not be consenting for him to penetrate her vagina and having regard to those circumstances known to him it was unjustifiable for him to take the risk and penetrate the complainant's vagina, you may find that the accused was reckless as to whether or not the complainant was consenting. Simply put, you have to see whether the accused did not care whether the complainant was consenting or not.
28. Please remember that knowledge and intention of an accused can only be inferred based on the other proven facts because you will not find direct evidence regarding same.

Prosecution case

29. The complainant said in her evidence that;
- a) *She is a corrections officer at the Fiji Corrections Service. In September 2015 she was based at the Suva Remand Centre and she lived in the spinster's quarters at the Korovou Prisons compound.*
 - b) *On 17/09/15 around 7pm she joined her senior officer Mr. Katafono and his wife for drinks at their place. She had five cups of dried whiskey. Thereafter the three of them went to the Liquids nightclub. They met the 1st accused, COC Mataitini and COC Rakai before they entered the nightclub.*
 - c) *At the nightclub Mr. Katafono bought three jugs of rum and cola and the three of them shared the three jugs. Thereafter, the 1st accused, COC Mataitini and COC Rakai joined them. The six of them then shared another two jugs of rum and cola. After finishing the second jug she went to the washroom and she blacked out where she could not recall what happened after visiting the washroom.*

- d) Thereafter she could come to her senses when someone was on top of her and was putting his penis into her vagina. At that time she was not wearing anything below and only had the T-shirt on top. She struggled and tried to push the person away and the person kept calling her 'sid'. She recognized the voice and it was the 1st accused. She managed to see him from the street lights coming through the window. This was happening inside the first room in the visiting shed at the Suva Remand Centre.
- e) She tried to push him away but she was tired because she was drunk. She said she did not agree for the 1st accused to put his penis into her vagina. She said she did not say anything to the 1st accused. She did not scream because she was drunk and tired. The accused had inserted his penis inside her vagina before she came into her senses. Thereafter the 1st accused continued to penetrate her vagina with his penis even when she was pushing him away. Apart from pushing him, she bit the 1st accused's tongue when he tried to kiss her. Thereafter the 1st accused left her.
- f) Then the 2nd accused came inside. She could feel the 2nd accused on top of her, putting his penis into her vagina. She did not give her consent for the 2nd accused to put his penis inside her vagina. She was telling him 'please, enough'. When she told him this, the 2nd accused closed her mouth with his hand. She struggled but she was tired. When the 2nd accused stood up she could feel that her vagina was wet. Then he told her to get dressed.
- g) She does not know how she came to that waiting room in the remand centre because she was drunk and was blacked out. She wore her clothes and went to the spinsters' quarters. But she could not recall how she got to the spinster's quarters. She asked a colleague of hers on the next morning how she came to the quarters.
- h) While she was at the waiting shed that night, she can't remember whether anyone else apart from the 1st and the 2nd accused were there because she was drunk.
- i) That morning she did not tell her colleague about what happened because she was looking for someone senior whom she can trust. She noticed that she was not wearing her tights when she went to have her shower. There were stains and white mucus on her panty.
- j) When she went to the office she told Sgt. Major Siliwale about what happened. She had to wait till she was informed by the superiors in the Correction Service to complain to the police. She lodged the complaint with the police on the following Monday after she was given the approval by her superiors. She identified the two accused persons in court.
- k) During cross examination on behalf of the 1st accused she admitted that when she reported for duty on Friday morning she realized that people knew about what happened on the previous night and that she was embarrassed. She maintained that she reported the matter to the police on the following Monday because she had to follow the proper channels in the Corrections Service. She said she did not attend PT on Friday morning at 5am but she reported for duty at the Remand Centre at about 9.30am.

- l) When it was suggested that Rakai did not come with the 1st accused and Mataitini though he was there at the nightclub she said he came with the two. She said Mr. and Mrs. Katafono were still there when she went to the toilet where she blacked out. She could not remember when the couple left. She admitted that the fact that she informed Sgt. Siliwale on Friday morning about what happened is not mentioned in the two statements she had given to the police.
- m) When she was asked whether she was dancing at the nightclub while she was drinking she said 'I think by the time I was blacked out'. When it was suggested to her about certain other events that happened in the nightclub according to the 1st accused, she kept on saying that she was blacked out and she can't recall. She said the only time she can recall is when she regained consciousness and the 1st accused was on top of her. When it was suggested to her about certain events that took place after the alleged incident inside the waiting area including the fact that she took off her 'RKS' T-shirt and covered her face, she said she can't recall because she was drunk.
- n) She said she was wearing her 'RKS' T-shirt when she woke up on Friday morning. It was suggested to her that she covered her face to avoid her being detected on the CCTV camera, she said she can't recall. She said she regained consciousness when the 1st accused was forcing himself and after that she blacked out again. When it was suggested to her that the 1st accused did not force her into doing anything with him, she said she can't recall. When it was suggested to her that she can't say whether she did not consent to having sex, she said 'because I was blacked out'. When it was suggested to her that if she was raped she could have told COC Gavidu who was the first person she met, she said she does not know that she had a conversation with Gavidu because she was blacked out that time.
- o) During cross examination on behalf of the 2nd accused she said she did not attend the physical training (PT) on Friday morning. When she was asked whether she was blacked out before she realized that the 2nd accused was on top of her she said 'yes'. Then when she was asked whether she regained consciousness only when he got on top of her she said 'yes'. When it was suggested that the 2nd accused turned on the torch in his mobile phone when he came into the room, she said she can't recall 'when he switched on the light from his phone'. When it was suggested to her that she grabbed the 2nd accused's hand and told him 'lick my vagina now and have sex with me now', she said 'I couldn't recall that part because I was blacked out'. Again when it was suggested that the 2nd accused told her that 'we have a relationship of respect', she said 'I couldn't recall that moment'. When it was suggested that she kept insisting that the 2nd accused lick her vagina and have sex with her, she said 'I was blacked out and I couldn't recall'.
- p) During re-examination she said she did not mention in her statement to the police about informing the Sgt. Major on Friday morning because she was just telling the story to the lady police officer. Again she said that she does not know why she did not mention that to the police. She said, by 'unconscious' she means that she was

blacked out and she can't recall. She said she specifically remember what happened inside the room because something was done by force.

30. The second witness was Alumeci Rokobua. She said that;

- a) *In September 2015 she lived in Korovou spinsters' quarters because she was employed as a prisons officer. She knows the complainant because they were recruited to the Corrections Service together. On 18/09/15, early morning she was awoken when she heard the complainant walking around the quarters. They used to call each other 'mata'. When she called out to the complainant saying 'mata', the complainant responded where she also said 'mata'. Thereafter the complainant went to her room and she went back to sleep. At this time the complainant was really drunk because she could smell liquor.*
- b) *During cross examination on behalf of the 1st accused she said when she saw the complainant the complainant was standing near the door to her room.*

31. Third witness for the prosecution was Silivenusi Gavidi. He said that;

- a) *He is working at the Fiji Corrections Service for the last four years. In September 2015 he was based at the Korovou Remand centre. He said he knows both accused as they passed out in the same year. He was the night guard at the main gate of the Remand centre on 17/09/15. Around 1.30am on 18/09/15, he went to the control room to have a cup of tea. When he came out of the control room after 2am, he saw two figures near the waiting shed and he walked up towards the waiting shed. On his way he saw the 2nd accused driving a carrier and parking it. He approached the 2nd accused and spoke with the 2nd accused. Then he walked up to the waiting shed where he met the 1st accused and asked the 1st accused who was the second person.*
- b) *The 1st accused said it was only him. Then he asked him again where he told the 1st accused that he saw two figures. Thereafter, the 1st accused told him that it was the complainant. He told the 1st accused not to stay there and take her somewhere else. Thereafter there was a conversation between him, the 1st accused and the 2nd accused. The 2nd accused told the 1st accused that he will take the complainant to the quarters. After that the 2nd accused went to the complainant who was in the room. He again told the 1st accused what he told him before and that it will bring a bad reputation to his job.*
- c) *After that, he went to see the complainant in the room and he saw the complainant having a conversation with the 2nd accused. This was about one and half minutes after the 2nd accused went inside the room. He wanted to see whether the complainant is there or not. When he went to the room he saw the 2nd accused sitting in front of the door and the complainant was sitting right inside the room. He said it was very dark inside.*
- d) *Thereafter again he told the 1st accused to take the complainant to the barracks while he was having a conversation with the 1st accused inside the waiting shed. Thereafter the 1st accused went in and brought the 2nd accused out. He said the 2nd*

accused told him that the complainant wanted him to lick her. After he finished the conversation with the 2nd accused, he saw the complainant and the 1st accused coming out from the room. He saw the complainant taking off her T-shirt and covering her head because it was raining. Then the 2nd accused and the complainant went down slope and the 1st accused went to his barracks. After a minute the 2nd accused came back running to go back to his bure.

e) During the cross examination on behalf of the 1st accused he said it took him two minutes to come from the bottom of the driveway to the top. He said the complainant did not complain to him about anything when she came out.

32. At the end of the prosecution case you heard me explain several options to the accused persons. They had those options because they do not have to prove anything. The burden of proving an accused person's guilt beyond reasonable doubt remains on the prosecution at all times. The first accused chose to give sworn evidence and to call one witness. The second accused also chose to give sworn evidence.

Defence case

33. The 1st accused said in his evidence that;

a) In September 2015 he was working as a prison officer. On 17/09/15 he had dinner with COC Mataitini at the Wishbone Restaurant. When they came out from Wishbone they met PCO Katafono, his wife and the complainant. Thereafter he and Mataitini went to the Friends Nightclub where they had two jugs of rum and cola. Then they went to Liquids Nightclub and joined PCO Katafono, his wife, the complainant and Rakai. There, Mataitini bought two jugs.

b) While they were drinking, the complainant was leaning towards him. They started kissing and they moved away from the group. He said the complainant was cuddling him and at one point she took his hand and put it inside her pants. She asked him to go to the toilet and he refused. He could recall that Katafono and the wife had already left before complainant and he started kissing.

c) He left the nightclub with Mataitini and the complainant after the complainant told him that they should leave. The complainant stopped a taxi. He said the complainant was well, she could talk and she was in a good form. He said he got into the taxi first and the complainant and Mataitini had an argument outside the taxi as the complainant wanted to sit at the back with him. Thereafter on the complainant's instructions the taxi came to Korovou.

d) When they reached Korovou, Mataitini stopped the taxi at the bus stop and asked the complainant to get down and to go to her quarters. The complainant refused and she wanted to go with him. Then the taxi went inside the remand centre. While Mataitini was paying the fare he and the complainant got off the taxi. The

complainant asked him whether they can go to the spinsters' quarters. He told her that he can't do that because he might get into trouble. He also told her that he can't take her to his barracks. Then the complainant told him 'what about this place which is right here' and took his hand and pulled him towards the shed. She asked him to have sex in the room there and he said 'yes'. Inside the room they undressed themselves. Thereafter they had sex. He said the complainant touched his penis and she touched it when they were at the night club as well.

- e) He said the complainant was conscious at this time and knew that he was on top of her. When he stood up after having sex, the complainant was asking him for more saying that she is not satisfied yet. But he told her that he has no energy left. He then went outside the room where he met Gavididi.
- f) When Gavididi asked him who he was with, at first, he said it was only him. But when Gavididi told him that he saw two figures then he said 'o, it was Sydney'. Then Gavididi told him to take the complainant away from the area because he might get into trouble.
- g) After that the 2nd accused came to him and asked him who he was with. He told the 2nd accused that he was drinking with the complainant in town. The 2nd accused did not believe him so the 2nd accused went inside the room to check. He was standing outside with Gavididi. Thereafter Gavididi went inside the room to see what's happening. Gavididi came back and told him to take the complainant to the barracks because he brought her.
- h) He said the 2nd accused took the complainant to the barracks. He said the complainant was well at this time and she took her RKS T-shirt off and covered her head. He spoke to the complainant and they were joking and laughing before the 2nd accused took the complainant to the barracks. He said the complainant's condition was good, she could talk clearly, he could understand what she said and the complainant could walk straight.
- i) The next morning when he reported for duty at 6.45am he heard rumors saying that he 'cracked' the complainant. He was a bit shocked and he went looking for the complainant to tell her not to spread rumors.
- j) During cross examination on behalf of the prosecution, he admitted that it was the first time for the complainant to behave in the manner she behaved when they were at the nightclub. When it was suggested that she acted that way because she was under the influence of alcohol, he denied and said that the complainant knew what she was doing. He said the reason he did not want to go to the toilet with the complainant was because it was the girls' toilet.
- k) He said he first lied to Gavididi because he didn't want Gavididi to know that he was with the complainant. He said he did not take the complainant to the barracks because he didn't want to be seen with her in the barracks. He denied the suggestion that the complainant bit his tongue when he did not stop after the complainant tried to push him.

- l) During re-examination he said he got the cut in his tongue when he pushed the complainant away from him while they were kissing when he saw Mataitini coming towards him.*

34. The second witness for the 1st accused was Cokanasiga Mataitini. He said that;

- a) He had dinner with the 1st accused at Wishbone on 17/09/15. After they had dinner they met Katafono, his wife and the complainant. They met Mr. Katafono, his wife and the complainant again at the Liquids nightclub. He bought two jugs and took it to Mr. Katafono, the wife and the complainant.*
- b) When they were drinking, the complainant was pulling the 1st accused towards her. She was kissing the 1st accused and he saw the complainant take the 1st accused's hand and put it inside her pants. When Mr. and Mrs. Katafono were leaving, they asked the complainant to come with them but the complainant wanted to stay and drink with him and the 1st accused.*
- c) They left the nightclub when the complainant wanted to leave. The complainant stopped a taxi. He told the complainant to sit in front but she resisted and said that she wants to sit with the 1st accused at the back seat. He thought that they would go to another nightclub, but the complainant told the taxi driver to go to Korovou. He told the taxi driver to stop at the bus stop and told the complainant to get off and go to her bure. But the complainant resisted and she just wanted the 1st accused. It made him think that way because the complainant was hugging the 1st accused inside the car.*
- d) During cross examination on behalf of the prosecution, he admitted that he was shocked when he saw the complainant kissing the 1st accused because the complainant never acted that way while she was sober. He admitted that he had not mentioned the fact that he saw the complainant putting the 1st accused's hand inside her pants in the statement he gave to the police. He also agreed that the fact that they were hugging inside the taxi is also not mentioned in his statement.*
- e) During re-examination he said he had not had drinks with the complainant before that night.*

35. The 2nd accused said in his evidence that;

- a) He was a prison officer in September 2015. He was attached to the Transport Department. On 17/09/15 he was at the Commissioner's residence. He left the Commissioner's residence after 1am on Friday morning. He parked the vehicle close to the waiting shed near the front gate of the remand centre. When he got out of the vehicle he saw the 1st accused standing inside the waiting shed. The 1st accused told him that he was drinking with the complainant in town. When they were having the conversation he heard someone coughing from the waiting shed. He asked the 1st accused who is inside. The 1st accused said that it is the complainant and they just finished having sex.*

- b) *He did not believe what the 1st accused told him so he went inside the room to check. He stood near the main door and it was dark inside the room. He switched on the torch light in his mobile phone and then he saw the complainant leaning to a wall inside the room. When he asked, the complainant told him that she came back from town after drinking with the 1st accused. Then he saw that the complainant's panty was up to her knees and he told her to wear it. He assisted the complainant to locate her trousers and also to put it on.*
- c) *He said he had to squat down to help the complainant to wear the trousers. Thereafter the complainant held his hand and told him to lick her and have sex with her. He refused and told her that he is from her mataqali. He also told her that she is drunk and he is not and that she does not know what she is doing.*
- d) *Thereafter he brought the complainant outside. When the complainant saw Gavidu she braced herself against the main door. He went to Gavidu and told him what the complainant told him inside the room. He said the complainant took her T-shirt off and covered her head. They were standing in that area for about three minutes having a conversation.*
- e) *Then he took the complainant down to the bure. He saw the complainant having PT the next morning. He heard from his workmates that he and the 1st accused had 'cracked' the complainant. He was ashamed when he heard this because he did something else.*
- f) *During cross examination on behalf of the 1st accused he said the complainant walked on her own when he took her down. He said he drove the complainant for PT.*
- g) *During cross examination on behalf of the prosecution he agreed that he helped the complainant to put her second leg into her pants because she was struggling to wear it herself. He agreed that she was struggling because she was heavily drunk. He again said that the complainant was not that drunk. He said the reason he took the complainant to her barracks is because she is a colleague and is also from his mataqali. He agreed that, before he went inside the room he knew that the complainant had been drinking.*

36. That is a summary of the evidence adduced by the prosecution and the defence. Please note that I have only referred to the evidence which I consider important to explain the case and the applicable legal principles to you. If I have not referred to certain evidence which you consider important, you should still consider that evidence and give it such weight you may think fit.

Analysis

37. With regard to the first count, the first accused does not dispute the fact that he inserted his penis inside the complainant's vagina and had sexual intercourse

with her. However, the first accused says that the sexual intercourse was consensual. The complainant says that she did not consent for the 1st accused to insert his penis inside her vagina. She in fact says that when she regained consciousness after she blacked out inside the washroom in the night club, the accused had already inserted his penis inside her vagina. She says that even when she kept on pushing the accused away after she regained consciousness, the 1st accused continued penetrating her vagina.

38. With regard to the 1st count, the prosecution should prove beyond reasonable doubt that the complainant did not consent for the 1st accused to penetrate her vagina with his penis and the 1st accused either knew or believed that the complainant was not consenting or he was reckless as to whether or not she was consenting.
39. The second accused totally denies the allegation against him. The complainant says that after the first accused left, the 2nd accused came inside the room and he penetrated her vagina without her consent. Therefore, with regard to the second count against the 2nd accused the prosecution should prove that the 2nd accused penetrated the complainant's vagina with his penis without the complainant's consent and the 2nd accused either knew or believed that the complainant was not consenting or he was reckless as to whether or not she was consenting.
40. The defence says that the complainant is not a credible and a reliable witness. The defence points out that according to the complainant's own testimony she could not remember many things because she was drunk and blacked out at the night club and therefore, her evidence cannot be relied upon. The defence also says that the complainant had decided to make a complaint against the accused because she was embarrassed due to the rumours that went around in the Remand Centre.
41. According to the evidence in this case, the matter was reported to the police about 03 days after the alleged incidents. If there is a delay in making a complaint, that may give room to make-up a story, which in turn could affect the reliability of the story. If the complaint is prompt, that usually leaves no

room for fabrication. If there is a delay, you should see whether there is a reasonable explanation to such delay. Your task is to decide whether you are sure that the complainant has given you a truthful and a reliable account of her experience concerning the offences the accused are charged with.

42. I should also direct you with regard to the relevance of intoxication to the offence of rape. In this case there was evidence that both the complainant and the 1st accused had been drinking. You heard from the complainant that she blacked out as a result of drinking alcohol when she was in the night club until the 1st accused was on top of her. She also could not remember what happened after the alleged incidents inside the waiting shed until she woke up on Friday morning in her room.
43. Drunkenness can affect a complainant of a rape case in two ways. Firstly, a person who is drunk, depending on the degree of intoxication, may do things which he/she would not do or less likely to do if he/she is not drunk. Secondly, a complainant may get drunk to the extent that his/her capacity to exercise a choice is totally removed.
44. It is for you to decide the extent of the complainant's drunkenness based on the evidence and whether her drunkenness had any bearing on what took place in the morning on 18/09/15.
45. When it comes to a rape charge, according to our law, drunkenness or intoxication which is self-induced is not a defence. You need to look at all the circumstances as they would have appeared to the accused had he been sober. It is not a defence for an accused in a rape case to take up the position that he would not have behaved in the way he did, had he not been drunk. Therefore, considering the circumstances of this case you should bear in mind that intoxication cannot be considered as a defence.

46. You must remember to assess the evidence for the prosecution and defence using the same yardstick but bearing in mind that always the prosecution should prove the case against the accused beyond reasonable doubt.
47. I must again remind you that even though an accused person gives evidence, he does not assume any burden of proving his case. The burden of proving the case beyond reasonable doubt remains on the prosecution throughout. An accused's evidence must be considered along with all the other evidence and you can attach such weight to it as you think appropriate.
48. Generally, an accused would give an innocent explanation and one of the three situations given below would then arise in respect of the relevant offence;
- (i) You may believe his explanation and, if you believe him, then your opinion must be that the accused is 'not guilty'.
 - (ii) Without necessarily believing him you may think, 'well what he says might be true'. If that is so, it means that there is reasonable doubt in your mind and therefore, again your opinion must be 'not guilty'.
 - (iii) The third possibility is that you reject his evidence. But if you disbelieve him, or his witnesses, that itself does not make him guilty. The situation would then be the same as if he had not given any evidence at all. You should still consider whether prosecution has proved all the elements beyond reasonable doubt.

If you are sure that the prosecution has proved all the elements, then your proper opinion would be that the accused is 'guilty' of the offence.

49. Any re-directions?
50. Madam and Gentlemen Assessors, that is my summing up. Now you may retire and deliberate together and may form your individual opinion on the charges against each accused. When you have reached your separate opinion you will come back to court and you will be asked to state your separate opinion.

51. Your opinion should be as follows;

1st count (against the 1st accused) – guilty or not guilty

2nd count (against the 2nd accused) – guilty or not guilty



Vinsent S. Perera

JUDGE

Solicitors for the State : Office of the Director of Public Prosecutions, Suva.
Solicitor for the 1st Accused : Pacific Chambers, Barristers & Solicitors, Suva.
Solicitor for the 2nd Accused : Legal Aid Commission, Suva.